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CITY OF PALOS VERDES ESTATES and
CHIEF OF POLICE JEFF KEPLEY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA; WESTERN DIVISION

CORY SPENCER, an individual;
DIANA MILENA REED, an
individual; and COASTAL
PROTECTION RANGERS, INC., a
California non-profit public benefit
corporation,

Plaintiffs,

v.

LUNADA BAY BOYS; THE
INDIVIDUAL MEMBERS OF THE
LUNADA BAY BOYS, including
but not limited to SANG LEE,
BRANT BLAKEMAN, ALAN
JOHNSTON aka JALIAN
JOHNSTON, MICHAEL RAE
PAPAYANS, ANGELO FERRARA,
FRANK FERRARA, CHARLIE
FERRARA and N.F.; CITY OF
PALOS VERDES ESTATES;
CHIEF OF POLICE JEFF KEPLEY,
in his representative capacity; and
DOES 1-10,

Defendants.

**[EXEMPT FROM FILING
FEES PURSUANT TO
GOVERNMENT CODE
§ 6103]**

Case No. 2:16-cv-02129-SJO-RAO

Assigned to District Judge:
Hon. S. James Otero; Courtroom: 10C
@ 350 W. First Street, L.A., CA 90012

Assigned Discovery:
Magistrate Judge: Hon. Rozella A. Oliver

**[Exempt From Filing Fees Pursuant To
Government Code § 6103]**

**DEFENDANT CITY OF PALOS
VERDES ESTATES AND CHIEF OF
POLICE JEFF KEPLEY'S RESPONSE
TO PLAINTIFFS' MEMORANDUM IN
SUPPORT OF ITS REQUEST FOR
RECORDS FROM THE PERSONAL
DEVICES OF PALOS VERDES
ESTATES POLICE OFFICERS**

[Filed with Declaration of Christopher
Glos]

Complaint Filed: March 29, 2016
Trial: December 12, 2017

1 **TO THE HONORABLE COURT AND ALL PARTIES OF RECORD:**

2 The City of Palos Verdes Estates and Chief of Police Jeff Kepley
3 (collectively, the “City”) hereby provide a Response to Plaintiffs’ Memorandum.

4 **I. INTRODUCTION**

5 Plaintiffs’ argue that they informed the City at the start of litigation to their
6 belief that cell phone data was important. They then admit to being placed on
7 notice in early November 2016 that the City had no control, custody or possession
8 of police officers’ personal cell phone devices. Plaintiffs further admit to being
9 informed multiple times over subsequent months that the City had no control,
10 possession, or custody of police officers’ personal cell phone devices. Nonetheless,
11 for nearly 8 months, Plaintiffs did nothing.

12 Plaintiffs now argue that they had no obligation to act because City policy
13 prohibits use of personal devices for work communications.¹ Therefore, according
14 to Plaintiffs, it was not until Sergeant Barber’s June 22, 2017 deposition that they
15 learned that police officers were using personal devices for work-related
16 communications. The flaw in this argument is that it is not accurate. Sergeant
17 Barber unambiguously testified that he did not use his personal cell phone for
18 work-related communications. Moreover, there is no evidence that any police
19 officer used his/her personal cell phone for work-related communication. Plaintiffs
20 attempt to muddy these facts by disparaging the City and its counsel with
21 unsubstantiated allegations on a litany of irrelevant issues. But the facts show that
22 Plaintiffs did nothing for 8 months to obtain allegedly “important” discovery, and
23 they then misrepresented Sergeant Barber’s testimony to hide this delay in the

23 ¹ Plaintiffs’ litigation contentions that police officers acted inappropriately
24 undermines their new argument that Plaintiffs relied on those same officers to
25 comply with City’s policy on cell phone usage. Nonetheless, this new argument
26 misstates the City’s Response, which in relevant part provides: “There is no policy
27 prohibiting City peace officers from use of a personal cell phone while on duty;
28 however, [any usage regarding City business may constitute a public record so] no
Police Officer or Police administrative staff are permitted to use their personal
electronic devices to transmit any written communication that may constitute a
public record.” [Dkt. 404-6 (5:5-13)]. Thus, employees may use personal devices,
but they are not to use them for any communication that constitutes a public record.

1 hopes of creating some triable issue to defeat the City's summary judgment motion.

2 **II. BACKGROUND**

3 Plaintiffs allege that the City discriminated against them as non-resident
4 surfers in violation of the Equal Protection Clause. The Section 1983 claim is the
5 only cause of action against the City and it is subject to a summary judgment
6 Motion on the ground that the due process clause does not impose upon a public
7 entity an affirmative obligation to protect Plaintiffs from the alleged harmful
8 conduct of the Lunada Bay Boys. *See De Shaney v. Winnebago County Department of*
9 *Social Services* (1988) 489 U.S. 189. Further, as a distinct and separate argument,
10 the Plaintiffs cannot establish the essential elements of a *Monell* claim because
11 there is no evidence of actionable conduct pursuant to an official policy, an official
12 with final policy-making authority, or ratification of a subordinate's action. *See*
13 *Monell v. Dep't. of Soc. Servs.* (1978) 436 U.S. 658. The City cannot be held liable
14 under Section 1983 due to third-party conduct against Plaintiffs or on a *respondeat*
15 *superior* theory, and Plaintiffs' Motion for Administrative Relief is merely a fishing
16 expedition and attempt to smear the City with innuendo and conclusory allegations²
in the hope it will resonate with the Court to defeat summary judgment.

17 **III. ARGUMENT**

18 Plaintiffs admit that the City informed them by at least November 10, 2016
19 that it was "not in possession, custody, or control of any personal devices of City
20 police officers." [Memo, 3:15-16]. Plaintiffs admit that it disagreed with the City's
21 position as early as November 22, 2016. [Memo, 3:17-19]. Plaintiffs admit the
22 City further communicated that it was not in possession, custody, or control of any

23 ² Plaintiffs claim they moved to compel police officer personal cell phone data
24 – citing evidence as docket nos. 392 and 393. Docket no. 392 is a motion against
25 Defendant Sang Lee and Docket no. 393 is the untimely and denied motion that
26 was resolved on September 12, 2017 when the City produced several photographs
27 inadvertently not attached to a report produced with initial disclosures and stated
28 that several produced videos were incorrectly dated. [Dkt. 452]. Plaintiffs also
improperly imply that the 14 times it sought Court discovery assistance was due to
the City's unethical actions when in reality it shows how quickly the Plaintiffs
could have addressed this personal cell phone issue with a telephonic call to the
Court had they wanted to do so.

1 police officer personal cell phone on December 29, 2016. [Memo, 3:19-21].
 2 Plaintiffs did nothing, but decided to serve written discovery on the cell phone issue
 3 on February 17, 2017. [Memo, 3:22-23]. On March 30, 2017, the City again
 4 informed Plaintiffs that it did not have possession, control, or custody of police
 5 officers' personal cell phones. The City also requested Plaintiffs submit an offer of
 6 proof regarding the relevance of the discovery. [Dkt. 404-6 (4:19-28)]. Plaintiffs
 7 provided no response. The City also provided Plaintiffs – for the second time – the
 8 Police Officers' Associations' ("POA") letter of objection. *Id.* Plaintiffs, who now
 claim this information is important, still did nothing.

9 On June 22, 2017, at Sergeant Barber's deposition, Plaintiffs allege they
 10 learned for the first time that police officers were using their personal cell phones.
 11 [Memo, 4:17-20]. Plaintiffs prior briefs/arguments claim this personal cell phone
 12 usage was work-related [Dkt. 428 (3:14-15)], but Plaintiffs do not go so far in this
 13 Memo because it was shown to be false during the September 12, 2017 call with the
 14 Court. As discussed on that call, Sergeant Barber did testify that police officers
 15 "bring" their personal cell phones into the field. [Declaration of Christopher Glos
 16 ("Glos Decl."), Ex. 1 (85:17-86:12)]. However, Sergeant Barber never testified that
 17 personal cell phones were used for anything other than personal business:

18 Q. "...do officers use their personal phones more frequently than the
 19 City-assigned phones?"

20 Objections omitted.

21 Q. "In your experience?"

22 A. "Just for personal calls to family and friends."

23 Q. "So what would – so they use their – they use their phone for calls to
 24 family and friends. Occasionally, to other officers; is that right?"

25 A. "Which is usually just personal stuff."

26 [Glos Decl., Ex. 1 (87:25-88:13)].

27 Plaintiffs' next line of questions and Sergeant Barber's relevant responses:

28 Q. "Have you ever texted – I'll (sic) as you personally – or have you ever
 received a text from an officer that might be even tangentially work-related?"

1 Objections and counsels' discussion omitted. Plaintiffs' counsel then asks
2 about personal phone use for work.

3 Q. "How about related to something you observed in the field?"

4 A. "No."

5 Q. "How about related to something where somebody else observed in the
6 field?"

7 A. "No."

8 Q. "That's never happened?"

9 A. "Not that I can recall, no." [Glos Decl., Ex. 1 (88:14-90:1)].

10 Plaintiffs' repeated claims that "Sergeant Barber [] admitted that police
11 officers use their personal cell phones to exchange work-related texts while on
12 duty" is demonstrable false. [Dkt. 428, 3:14-15]. The testimony is unambiguous:
13 Sergeant Barber did not send or receive work-related telephone calls or text
14 messages on his personal cell phone.³

15 In spite of the evidence informing Plaintiffs in June 2017 that police officers
16 do not use their personal cell phones for work-related purposes, Plaintiffs attempt to
17 argue entitlement to the personal cell phone data by claiming "Sergeant Barber
18 testified that he does go to parties with Charlie Mowat, he does communicate by
19 text and cell phone with Charlie Mowat, and we know that Charlie Mowat is a Bay
20 Boy.... And we didn't know about this until his deposition in June." [Glos Decl,
21 Ex. 1 (50:8-14)]. They reiterate this claim in the Memo. It is true that Sergeant
22 Barber knows Charlie Mowat and considers him, while not close, a friend. [Glos
23 Decl., Ex. 1 (71:8-72:8)]. However, there is no evidence that Sergeant Barber used his
24 personal cell phone to communicate with Mr. Mowat or any other alleged Lunada Bay
25 Boy about work-related issues. Sergeant Barber testified that he has never spoken to
26 any of the named Lunada Bay Boys on his personal cell phone. [Glos Decl., Ex. 1
27 (90:19-92:15)]. That includes Sang Lee, Brant Blakeman, Alan Johnston, Michael

28 ³ Plaintiffs not only misrepresent Sergeant Barber's testimony, but they also
improperly apply the misrepresentation to all police officers. Plaintiffs have
offered no evidence that any police officer used their personal cell phones for work-
related communications.

Papayans, Angelo Ferrara, Frank Ferrara, Charlie Ferrara, and N.F. Further, while Plaintiffs named a number of purported “Bay Boys” in the lawsuit, Mr. Mowat is conspicuously not one of them. Plaintiffs have also failed to present any evidence that Mr. Mowat is a “Bay Boy”.⁴ More importantly, Sergeant Barber testified that he had never seen chats or text messages from Mr. Mowat to anyone, which presumably includes himself. [Glos Decl., Ex. 1 (145:24-146:5)].

IV. CONCLUSION

Plaintiffs’ Motion for Administrative Relief should be denied and the City’s Summary Judgment Motion heard on the merits. However, if this Court concludes Plaintiffs were diligent, the City requests the Court consider whether Plaintiffs met their additional burdens required for a FRCP 56(d) motion, which has been fully briefed. In addition, to the extent the Court is considering ordering disclosure, the City – and POA – request an opportunity to brief the issue, including *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608.⁵

Dated: September 25, 2017

KUTAK ROCK LLP

By: /s/ Christopher D. Glos

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Christopher D. Glos
Attorneys for Defendants
CITY OF PALOS VERDES ESTATES
and CHIEF OF POLICE JEFF KEPLEY

⁴ The May 5, 2016 internal affairs investigative report relied on by Plaintiffs refers to Messrs. Mowat and Thiel as “local resident[s]”, not “Bay Boys”. The internal investigation report was initiated at the direction of the City to attempt to identify the source of the undercover operation leak. The report concluded that because there were likely hundreds of individuals with knowledge of the operation, the vast majority of whom were from outside the City, no evidence attributed the leak to any individual, much less a City police officer.

⁵ For example, the Supreme Court provides guidance in balancing between privacy and disclosure by permitting an affidavit upon which to determine whether contested items were public records or personal materials. *Id.* at 628. In this case, the Court has the equivalent of an employee affidavit in Sergeant Barber’s sworn testimony that he did not use his personal phone for work-related purposes. If necessary, these additional issues should be briefed prior to invading the privacy rights of individual police officers who are not named parties.